United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-1868

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

No. 74-1868

KATRINA McEACHERN,
Plaintiff-Appellant

v.

ANDREW CONSIGLIO, et al,
Defendants-Appellees

On Appeal from the United States District Court
for the District of Connecticut

PETITION FOR REHEARING AND FOR REHEARING IN BANC

Michael Avery
Williams, Avery & Wynn
265 Church Street
New Haven, Connecticut
06510
Attorney for Plaintiff-Appellant

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INTRODUCTION

Pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure, plaintiff-appellant McEachern respectfully requests that the Court reconsider its decision affirming the judgment of the District Court, and that the reconsideration be in banc.

On November 20, 1974, this Court (the Hon. Judges Smith, Hays and Mansfield) affirmed the judgment of the District Court of Connecticut. The decision was made from the Bench, and no written opinion of the Court will be rendered. At oral argument, presiding Judge Mansfield stated that the Court was of the opinion that there would be no precedential value to a written opinion. He further stated that Judge Smith had requested that the record reflect that he felt bound to follow the decision of this Court in Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2 Cir. 1972), but that in the absence of that prior decision he might have ruled upon appellant's arguments differently.

I. THE DECISION OF THIS COURT IN BIVENS V. SIX UNKNOWN NAMED AGENTS, 456 F.2d 1339 (1972) IS NOT A CORRECT STATEMENT OF THE LAW WITH REGARD TO THE DEFENSE OF GOOD FAITH AND PROBABLE CAUSE TO AN ACTION UNDER TITLE 42 UNITED STATES CODE, SECTION 1983, FOR A VIOLATION OF CIVIL RIGHTS.

In the absence of a written opinion, it is impossible for appellant to know with precision on what grounds the decision of this Court rests. However, it is probably safe to assume that the rationale of the Court in Bivens is the basis for decision. The Court, in affirm-

ing herein, has upheld the Bivens rule that police officers, in an action for violation of civil rights, need not establish that they had probable cause to establish a defense to a complaint of an unconstitutional search. Rather, they need only prove that they had a reasonable belief that their actions were lawful.

The essence of the Bivens opinion is that it is unfair to hold police officers personally liable for arrests and searches made without probable cause when the officers had a reasonable good faith belief that their actions were lawful. However, this charitable attitude toward law enforcement officers is a misapprehension of the function of the probable cause standard in relation to Fourth Amendment issues.

The Supreme Court has stated:

> Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed . . . It is important, we think, that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent . . . This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen. (citations omitted) Henry v. United States, 361 U.S. 98, 102 (1959).

Earlier, in Brinegar v. United States, 338 U.S. 160, 176 (1948), the Court had also made the same point:

> The rule of probable cause is a practical, non-technical conception affording the best compromise that has been

> found for accommodating . . . opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

The Supreme Court has always clearly stated that the standard of probable cause is that standard which both protects citizens from invasions of privacy, and allows law enforcement officers reasonable room within which to make decisions of when to arrest or search. This Court has abandoned this "best compromise," and adopted a "less stringent" standard (Bivens, supra, 456 F. 2d at 1348 [concurring opinion of Judge Lumbard]) in order to create greater protection for officers who act without probable cause. This less stringent standard denudes Fourth Amendment rights of citizens of the protection of the probable cause standard.

The rationale for this departure from constitutional principles is said to lie in the difficulty of probable cause determinations. However, the fact that police officers must sometimes make difficult decisions was recognized by the Supreme Court in Brinegar, supra, and was one of the "opposing interests" that the probable cause rule has been held to strike a balance between. In striking the balance, the Supreme Court had already taken into account the factor relied upon by this Court in coming to a different result.

The decision of this Court in Bivens and in the present case have in effect overruled the determination of the Supreme Court

concerning where properly to strike a balance between the protection afforded to citizens' rights and the protection afforded to police officers who violate their rights. However, this major constitutional departure from the Supreme Court was not discussed explicitly in Bivens, and has never been squarely addressed by this Court. As witnessed by the decision herein, the existence of the decision of a previous panel of the Court in Bivens will foreclose any future reconsideration of the issue unless it is heard by the Court in banc.

Such reconsideration is required in order to restore the constitutional content of the good faith and probable cause defense articulated in Pierson v. Ray, 386 U.S. 547 (1966). At the present time, law enforcement officers in this Circuit need only show that they had a reasonable belief that they had probable cause in order to establish their defense. Appellant urges the Court that it is imperative from a constitutional point of view to hold that the officers do not have a defense unless in fact they did have probable cause. Given the large numbers of cases which have been brought under 42 U.S.C. §1983, the issue is of great importance. As previously argued in appellant's brief, other Circuits have come to a different decision than the Second Circuit. See, e.g., Joseph v. Rowlen, 402 F.2d 367 (7 Cir. 1968).

The importance of this issue may further be appreciated by

considering the fact that innocent parties at the present time in this Circuit have less opportunity to redress violations of their civil rights than guilty persons. Individuals found in possession of contraband or other incriminating evidence may rely on the exclusionary rule to gain some vindication of their constitutional rights. Criminal charges brought against them will be dismissed when evidence is suppressed by the exclusionary rule. In making such determinations, the courts necessarily rely on probable cause standards.

However, innocent persons who are subjected to illegal searches usually do not get arrested. Since there is no criminal case against them, the exclusionary rule never comes into play. As a result, under Bivens, their rights are not protected by probable cause standards, but by the "less stringent" standard of the reasonable belief test.

No rationale for the difference in treatment between Fourth Amendment violations considered in criminal and civil cases has been adduced, other than protection of the officer. In fact, this protection is required neither by constitutional principles, as discussed above, nor by practical considerations.

II. THE REASONABLE GOOD FAITH BELIEF STANDARD IS NOT REQUIRED TO PROTECT THE FINANCIAL INTERESTS OF POLICE OFFICERS.

Appellant had argued in her brief and before the Court that the risk that officers might reasonably and in good faith violate persons' constitutional rights is an insurable risk. As such, it is not proper to balance away constitutional guarantees for the protection of the financial interests of individual officers. The proper balance is between the cost of insurance coverage to the citizenry (who would presumably pay for it in taxes) and the cost of reduced protection of constitutional rights. In striking this balance, the result must be to protect the constitutional rights not only of individual citizens, but of the citizenry as a whole.

Of paramount importance to any decision in this case, must be the fact that the officers here in fact have no personal exposure to payment of a judgment. At oral argument, defendant Consiglio's attorney, who acted in his capacity as Corporation Counsel for the City of New Haven, assured the Court that the City was self-insured and would pay any judgments rendered against police officers in §1983 actions. This guarantee of protection more than adequately safeguards the interests of the defendant police officers.

Furthermore, this places the burden where it properly belongs, on the financial resources of the city treasury, rather than on the constitutional rights of the citizens. This spreading of

financial burdens is routinely accepted in other facets of city life, whether it is accidents resulting from negligence in the construction of roads, or damage to property caused by negligent operation of municipal equipment. To shirk from allocation of financial burdens in cases involving protection of constitutional rights, when it is routinely done with regard to mundane matters, abandons the principle that the Constitution is the supreme law of the land.

III. REFERENCE TO THIS COURT'S OPINION IN BIVENS, SUPRA, DOES NOT JUSTIFY THE DISTRICT COURT'S JURY CHARGE IN THIS CASE.

Appellant raised two arguments in this appeal. The first was the content of the good faith defense. The second was that the trial court completely removed the issue of probable cause from the case by allowing the jury to find that the search was constitutional, even if probable cause was lacking.

The Court had instructed the jury that prior to reaching the issue of the good faith defense, it had to conclude whether the search was constitutional. If the jury concluded that the search was constitutional, it did not have to reach the issue of the officers' defense. In making that determination, the Court listed "sufficient basis" for believing that the men the officers were seeking were on the premises as only one of several factors to consider in determining the constitutionality of the search. (Joint Appendix, 52).

In so doing, the Court reduced probable cause to the status of only one of several factors to be taken into account in deciding the legality of the search, rather than holding probable cause to be the sine qua non of a constitutional search. This type of charge was recently condemned by the Third Circuit in Fisher v. Volz, 496 F.2d 333 (1974).

Reference to Bivens does not dispose of this flaw in the charge to the jury. The Bivens issue of a good faith defense would only have been reached by the jury if they found the search to be unconstitutional. Under the charge given, they might have found it to be constitutional, and therefore never reached the good faith defense question, even though they did not find there to have been probable cause for the search.

As a result the decision of this Court to affirm on the authority of Bivens leaves unsettled one of the issues in the case. Appellant urges that the charge to the jury was fatally defective without regard to the question of the officers' defense, and requests the Court to reconsider the decision on this ground.

IV. CONCLUSION

The issue of what defense is available to officers in civil rights actions is of paramount constitutional importance. At the present time, this issue is settled in this Circuit by the language of this Court in Bivens, which language is dictum in that opinion, and

which is an inaccurate statement of the law. Appellant urges that only consideration by the full Court, sitting in banc, will enable this Circuit to conform its decisions to those of the United States Supreme Court, and requests the Court to grant rehearing in banc.

Respectfully submitted,

MICHAEL AVERY
265 Church Street
New Haven, Connecticut 06510

Attorney for Appellant

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

KATRINA McEACHERN	:	
	:	
VS.	:	NO. 74-1868
	:	
ANDREW CONSIGLIO, ET AL	:	DECEMBER 2, 1974

CERTIFICATION OF SERVICE

This is to certify that two copies of the Petition for Rehearing and for Rehearing In Banc have been mailed, postage prepaid, to the offices of Roger J. Frechette, Esquire, 215 Church Street, New Haven, Connecticut, and George Eastman, Esquire, 265 Church Street, New Haven, Connecticut, this 2nd day of December, 1974.

Michael Avery

Michael Avery, Attorney for Appellant
265 Church Street
New Haven, Connecticut 06510
203-562-9931